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In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT EAGLE ELK, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether a defendant's statement, made during a noncustodial polygraph examination that the defendant took with his attorney's consent and after receiving *Miranda* warnings, must be suppressed because prior to the making of the statement the examiner advised the defendant that the polygraph showed some of his responses to be deceptive.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-11a) is reported at 682 F.2d 168. The oral opinion of the district court (App. B, *infra*, 12a–14a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 15a) was entered on June 30, 1982. A petition for rehearing was denied on August 27, 1982 (App. D, *infra*, 16a). On October 18, 1982, Justice Blackmun extended the time in which to file a petition for a writ of certiorari to and including November 25, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondent was indicted in the United States District Court for the District of South Dakota for voluntary manslaughter, in violation of 18 U.S.C. 1153 and 1112. The victim, Richard Schreiner, was killed during an altercation with respondent; respondent contended at trial that another person present at the altercation was responsible for Schreiner's death. App. A, *infra*, 1a-2a.

Respondent was first interviewed, by the Oglala Sioux Tribal Police, on the night of Schreiner's death. Before questioning him, the Tribal Police fully advised respondent of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Three days later, respondent was arrested, arraigned, and released on bond. App. A, *infra*, 3a & n. 2. Almost two months after his release on bond, respondent, on the advice of counsel, volunteered to take a polygraph examination administered by the FBI. Before beginning the examination, the examiner again gave respondent *Miranda* warnings, and respondent signed a form waiving his *Miranda* rights. He also signed a form specifically consenting to the polygraph interview. App. A, *infra*, 3a.

At one point during the interview with the polygraph examiner, the examiner advised respondent that the polygraph indicated that some of his responses were deceptive. Respondent subsequently told the examiner that he had twice struck Schreiner on the head with a rifle. App. A, *infra*, 3a. The United States District Court for the District of South Dakota denied respondent's motion to suppress this incriminating statement (App. B, *infra*, 12a–14a), and a jury convicted respondent of the lesser included offense of involuntary manslaughter. App. A, *infra*, 1a.

The court of appeals rejected respondent's claim that the use of his statement was impermissible under

Edwards v. *Arizona*, 451 U.S. 477 (1981), but it held the statement inadmissible under its decision in *Fields* v. *Wyrick*, 682 F.2d 154 (1982), petition for cert. pending, No. 82-158 (filed July 26, 1982). The court of appeals explained (App. A, *infra*, 4a):

> [Respondent] contends that his incriminating statement should have been suppressed because, in the absence of an additional *Miranda* warning after the polygraph examination but prior to further interrogation, the statement must be viewed as not being voluntarily made. In light of this court's recent decision in *Fields* v. *Wyrick*, * * * we feel compelled to agree. * * * The relevant circumstances in *Fields* are virtually identical to those in the instant case.

The court accordingly reversed respondent's conviction "on the basis of" its decision in *Fields* (App. A, *infra*, 5a).

Judge Ross, in a separate opinion, "concur[red] in the result * * * only because I am firmly convinced that it is required by this court's recent broad holding in *Fields* v. *Wyrick*" (App. A, *infra*, 6a). Judge Ross reviewed the objections to the *Fields* decision that he had stated in his dissent in that case. He noted, for example, that the court's holdings that the statements given to the polygraph examiners were "involuntary" did not rely "on considerations of coercive conduct by the polygraph administrator, [the suspect's] age, intelligence, emotional condition, or any other factors which clearly would be relevant to a determination of whether he might not have voluntarily, knowingly, and intelligently made the incriminating statement or waived his right to have counsel present" (App. A, *infra*, 6a). Judge Ross also pointed out that in this case, as in *Fields*, "a defendant has clearly and fully been advised on at least two occasions prior to the administration of the polygraph of the constitutional rights to remain silent and to the presence of counsel during any questioning

* * *. I can find no evidence in any of these cases that the defendants did not fully comprehend the meaning and the consequences of a waiver of those rights" (App. A, *infra*, 10a).

Judge Gibson also concurred "only because *Fields* v. *Wyrick* * * * requires this action" (App. A, *infra*, 11a). He stated that he agreed with the reasoning of Judge Ross's opinion. *Ibid.*

REASONS FOR GRANTING THE PETITION

1. The court of appeals' decision is plainly incorrect. The stated basis for the court's decision is that respondent's statement was not voluntarily made. App. A, *infra*, 4a. But as Judge Ross noted, the court of appeals did not even purport to undertake the "careful evaluation of all the circumstances of the interrogation" needed to determine whether a statement is involuntary (*Mincey* v. *Arizona*, 437 U.S. 385, 401 (1978)). See, e.g., *Sims* v. *Georgia*, 389 U.S. 404, 407 (1967); *Clewis* v. *Texas*, 386 U.S. 707, 709-712 (1967); *Haynes* v. *Washington*, 373 U.S. 503, 513-515 (1963); *Culombe* v. *Connecticut*, 367 U.S. 568 (1961). Nor is it plausible to conclude that respondent's statement was "not 'the product of his free and rational choice'" (*Mincey* v. *Arizona*, *supra*, 437 U.S. at 401, quoting *Greenwald* v. *Wisconsin*, 390 U.S. 519, 521 (1968)), or that his "will was overborne" at the time he made the statement (*Lynumn* v. *Illinois*, 372 U.S. 528, 534 (1963)). Respondent was subjected only to the "pressure" of being confronted with the polygraph examiner's opinion that his previous statements were not wholly truthful.[1] This

[1] It should be noted in this connection that it is a relatively routine aspect of the administration of polygraph examinations that when the polygraph shows a response to be deceptive, the examiner will ask the examinee if there are any circumstances that might account for the polygraph's indication. The examiner

Court's decisions indicate that even confronting an accused with *false* "evidence" of a much more damaging character does not by itself render his responses inadmissible. See, e.g., *Oregon* v. *Mathiason*, 429 U.S. 492, 495-496 (1977); *Michigan* v. *Mosley*, 423 U.S. 96, 98 & n.3 (1975).

In *Fields*, the court of appeals emphasized the defendant's right to counsel. See, e.g., 682 F.2d at 157-158 ("Fields did not knowingly and intelligently waive his right to have counsel present at the interrogation * * *. [His] incriminating statements were, therefore, not voluntarily made * * *."). The court appeared to be referring to the Fifth Amendment "right" to counsel referred to in the *Miranda* warnings. See 6827.2d at 158. But that right attaches only when a suspect is in custody, and under *Oregon* v. *Mathiason*, *supra*, respondent plainly was not in custody at the time of his polygraph examination; he was free on bond, he reported voluntarily to the examination, and there is no suggestion that he could not terminate the examination and leave at any time, as indeed he had been told he could do.[2]

The court of appeals' decision also is not sustainable on the basis of respondent's Sixth Amendment right to counsel.[3] See generally *United States* v. *Henry*, 447 U.S. 264 (1980). Respondent's counsel agreed to allow respondent to be questioned about the crime by the

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makes this inquiry so that, for example, any ambiguity or other imperfection in the question can be corrected.

[2] The court of appeals' conclusion that the defendant in *Fields* was in custody at the time of the polygraph examination also appears to be inconsistent with *Oregon* v. *Mathiason*. See 682 F.2d at 158 n.6.

[3] We note that in *United States* v. *Jackson*, No. 82-1433 (8th Cir. Oct. 14, 1982), the court of appeals applied *Fields* and *Eagle Elk* to suppress statements made during a polygraph examination at a time when the defendant's Sixth Amendment right to counsel plainly had not attached.

FBI polygraph examiner in counsel's absence, and there is no indication that he received any assurances, subsequently violated, about the nature of the questioning. This case is thus diametrically opposed to *Brewer* v. *Williams*, 430 U.S. 387 (1977). The Court has never suggested that a suspect, having waived a right at the beginning of the interview, must waive the same right again with each new question or at each point when the tenor of the interview might be said to have changed.

2. A petition for a writ of certiorari to review *Fields* is now pending before the Court. *Wyrick* v. *Fields*, No. 82-158 (filed July 25, 1982). Although the court of appeals' decision in this case appears to be, if anything, less defensible than its decision in *Fields*,[4] we do not believe the two cases are materially different for purposes of this Court's exercise of discretionary review. Accordingly, we submit that the present petition should be disposed of as the Court deems appropriate in light of its disposition of *Fields*.

CONCLUSION

The petition for a writ of certiorari should be disposed of as appropriate in light of the Court's disposition of *Wyrick* v. *Fields*, *supra*.

Respectfully submitted.

REX E. LEE
Solicitor General

NOVEMBER 1982

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[4] In *Fields*, for example, the defendant may not have consulted with his attorney before attending the polygraph interview (see 682 F.2d at 156), although the court of appeals held that the defendant had clearly "waived his right to have counsel present while the examination itself was being conducted" (*id.* at 160).